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IN THE

Supreme Court of the United States

October Term, 1967

No. 1341

EARL C. PEACOCK, JR. and FREDERICK L. SWEET,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH DEPARTMENT

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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No. .....

EARL C. PEACOCK, JR. and FREDERICK L. SWEET,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH DEPARTMENT

The petitioners Earl C. Peacock Jr. and Frederick L. Sweet pray that a writ of certiorari issue to review the judgment and order of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, rendered herein on January 26, 1968.

Opinion Below

The Appellate Division, Fourth Department, wrote a memorandum opinion in affirming each of the petitioner's convictions. Copies of each memorandum opinion are appended hereto. The amended orders of affirmance, also appended, recite that the federal constitutional questions presented herein were passed on by the New York Court.

The Hon. Alger A. Williams, Presiding Justice of the Appellate Division, Fourth Department, denied a motion

for leave to appeal to the Court of Appeals. He wrote no opinion. His certificate of denial of leave is appended hereto.

Grounds on Which Jurisdiction is Invoked

Judgment of conviction of perjury was entered against the defendants in the County Court of Erie County, New York, on January 21, 1967. Judgment of affirmance was thereafter entered by the Appellate Division of the Supreme Court of New York, Fourth Department, on January 26, 1968.

On March 14, 1968, the Hon. Alger A. Williams, Presiding Justice of the Appellate Division of the Supreme Court, Fourth Department, denied the appellants' motion for leave to appeal to the Court of Appeals of New York State.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

Questions Presented for Review

The defendants, both Buffalo police officers, were convicted of perjury before the Grand Jury. Their testimony was given under the compulsion of Article 1, Section 6 of the New York State Constitution, which directs the removal of any public officer who refuses to sign a waiver of immunity. Two questions are presented:

1) Could the defendants' perjury convictions be constitutionally based upon Grand Jury testimony which was coerced in violation of their federal constitutional rights under the 5th and 14th Amendments?

2) Were the federal constitutional rights of the defendants, under the 5th and 14th Amendments,

further violated by the trial court's failure to treat their Grand Jury testimony as confessions, and its refusal to afford the defendants a preliminary hearing as to its admissibility?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; * * *"

Constitution of the United States, Amendment XIV, Sec. 1:

"* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *"

New York State Constitution, Article I, Sec. 6:

"No person * * * shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connec-

tion with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law."

New York Penal Law, Sec. 1620:

"§ *1620. Perjury defined*

A person is guilty of perjury who 1. Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, depositions, certificate, affidavit or other writing by him subscribed is true, in, or in connection with any action or special proceeding, hearing, or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely, or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false;" * * *

New York Penal Law, Sec. 1620-a:

"*Sec. 1620-a. Perjury in the first degree*

A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered."

Statement of the Case

On June 3, 1964, at about 10 P. M., a burglary occurred at the Huber-Lanctot Lumber Co. in Buffalo. Both defendants were Buffalo police officers, assigned to a patrol

car in the vicinity. The Grand Jury of Erie County thereafter investigated the burglary.

Both defendants were suspects, and were targets of the investigation. Both testified before the Grand Jury under waivers of immunity signed at the direction of the District Attorney, who before the waivers were signed, read to the defendants the provisions of Article I, Section 6 of the New York State Constitution (R. 1338-41, Peacock; R. 1555-59, Sweet).

The Grand Jury thereafter jointly indicted both defendants for burglary, attempted grand larceny, five counts of perjury, wilful omission to perform their duties as police officers, and conspiracy to commit all four substantive crimes. A copy of the indictment is appended.

All five perjury counts were based upon the defendants' Grand Jury testimony. The trial resulted in either dismissal by the court, or acquittal by the jury on all but two counts of perjury. Neither defendant testified at trial. Both were convicted on the 5th and 6th counts, to wit:

Count 5. Both defendants were charged with testifying falsely that after the Police Department radio call at 10:08 P. M., with respect to the burglary, they drove west on Hertel Avenue in the police squad car, and turned left into a parking lot across the street from the scene of the burglary.

Count 6. Both defendants were charged with testifying falsely that they pursued a large dark car in the parking lot.

The Grand Jury testimony of both defendants (Peacock, People's Exhibit 106, R. 1338; Sweet, People's Exhibits 107, 108, R. 1555) was read to the trial jury over objection of the defendants (Peacock, R. 1215; Sweet, R. 1223).

Peacock and Sweet were sentenced on January 12, 1967 (R. 2152). On January 16, this court handed down its decisions in *Garrity v. New Jersey*, 385 U. S. 493, and *Spevack v. Klein*, 385 U. S. 511.

In the Appellate Division, the appellants argued that their Grand Jury testimony was coerced, in violation of their constitutional rights. *Garrity v. New Jersey* and *Spevack v. Klein* were cited in support of the appellants' position.

The appellants also cited *Gardner v. Broderick*, 20 N. Y. 2d 227, hereafter referred to. This court recently granted certiorari to review *Gardner v. Broderick*.

The constitutional issues raised herein were considered and passed upon by the Appellate Division, Fourth Department in affirming the convictions (Amended orders, Appendix).

The Appellate Division's memorandum decision cites *Peo. v. Goldman*, 21 N. Y. 2d 152 and *Peo. v. Tomasello*, 21 N. Y. 2d 143, both decided December 28, 1967. The New York State Court of Appeals in both cases refused to apply the rule of *Garrity* and *Spevack* to prosecutions for perjury arising out of the Grand Jury testimony itself.

Copies of the New York Court of Appeals' opinions in *Goldman* and *Tomasello* are also appended hereto.

REASONS FOR GRANTING THE WRIT

1

The New York Court of Appeals' decisions in *Goldman* and *Tomasello* upon which the *Peacock* and *Sweet* decision is based, are in conflict with this court's decisions in *Garrity* and *Spevack*.

In *Garrity*, the court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office * * *" (p. 500).

Peacock's and Sweet's prosecution for perjury was a "subsequent criminal proceeding." In *Garrity*, the court drew no distinction between earlier crimes to which the Grand Jury testimony related, and perjury in the testimony itself.

That Peacock's and Sweet's Grand Jury testimony was coerced, under the provisions of Art. 1, Sec. 6 of the New York State Constitution, must be conceded.

In *Gardner v. Broderick*, 20 N. Y. (2) 227 the petitioner, a New York City patrolman, refused to sign a waiver of immunity, and was not sworn before the Grand Jury. He was then dismissed from the force, under the provisions of the New York City Charter.

The New York Court of Appeals there recognized that *Garrity* "undoubtedly had the effect of partially invalidating Section 1123 of the New York City Charter, as well as Section 6 of Article I of the New York Constitution", and that if Gardner had signed the waiver and testified before

the Grand Jury, his testimony would have been "inadmissible in a criminal prosecution * * *".

The court affirmed Gardner's dismissal, however, on the ground that his refusal to testify constituted "insubordination" under departmental rules.

This court recently granted certiorari to review *Gardner* (Probable jurisdiction noted 1/29/68; 36 U. S. Law Week 3308; Case No. 635).

It is true that in *Garrity,* the police officer's sworn testimony, coerced by the threat of a New Jersey statute almost identical to Art. I, Sec. 6 of the New York State Constitution, was admitted as evidence of conspiracy, and not of perjury.

It is also true that in *Spevack* no element of perjury existed. In that case the court reversed the disbarment of the petitioner, an attorney, who had refused to produce his financial records or to testify under subpoena at a judicial inquiry into his professional conduct.

It is also true that in *Gardner* there was no perjury. The petitioner refused to sign the waiver of immunity and was not sworn.

In *Peo. v. Goldman* and *Peo. v. Tomasello,* the New York Court of Appeals held that *Garrity* and *Spevack* had no application to a situation where the defendant was charged with perjury, based upon the Grand Jury testimony itself, as opposed to a past crime, in proof of which the coerced Grand Jury testimony was offered.

The New York court there recognized, but disregarded three important distinctions between *Goldman* and *Tomasello* on the one hand, and many cases therein cited, on the other. They were:

1) In *Glickstein vs. United States,* 222 U. S. 139, the immunity granted the witness was statutory, under the Bankruptcy Act, rather than constitutional (*Tomasello,* p. 149, and cases there cited).

In *Glickstein,* the court specifically limited the question for decision as follows (p. 142):

> "In other words, the sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution?"

The defendants Peacock and Sweet had no statutory immunity when compelled to testify, as did the witness in the cases cited in *Tomasello* and *Goldman.*

2) In other cases cited by the New York court, the witness was not a "target" of the investigation.

Thus, in *United States v. Parker,* 244 Fed. 2d 943, Parker was not a target of the investigation. The court there stressed the fact that Parker was not "earmarked" for prosecution; hence, the United States Attorney's failure to warn him of his Fifth Amendment privilege against self-incrimination did not affect the false testimony; and "the evidence of perjury was untainted."

In *United States v. Orta,* 253 Fed (2) 312, cert. denied 357 U. S. 905 (*Tomasello,* p. 149), the 5th Circuit pointed out (p. 314):

> "There is no showing that the Grand Jury before which Orta testified was seeking to indict him * * *"

Peacock and Sweet were concededly targets of the investigation. They were later indicted for the burglary itself.

3) In other cases cited by the New York court, the witness either failed to assert his constitutional privilege,

or voluntarily waived it (*e.g. People v. Yonkers Construction Co.*, 17 N. Y. 2d 322 (*Goldman*, p. 157); *People v. Steuding*, 6 N. Y. 2d 214 (*Tomasello*, pp. 148-9).

Peacock's and Sweet's waivers were not voluntary. They were coerced.

Had Peacock and Sweet not signed the waivers of immunity, not only would they not have been compelled to testify; they would not have been allowed to testify.

These cases present a federal question of substance not heretofore determined by this court, and which has been decided by the New York court in a way probably not in accord with *Garrity, Spevack* and other applicable decisions of this court, to wit:

Does the constitutional protection of the Fifth and Fourteenth Amendments extend to a Grand Jury witness who is a "target" of the investigation; whose testimony is coerced by the statutory threat of loss of his job; and who thereafter commits perjury before the Grand Jury?

The petitioner's Fifth Amendment protection should be as extensive as that afforded by the Fourth as to illegally seized evidence.

The entire indictment against Peacock and Sweet was to a large extent the fruit of their "tainted" Grand Jury testimony. It was the result of their illegally coerced testimony. A copy of the indictment is appended.

In *Nardone v. United States*, 308 U. S. 338, the court forbade the government to use evidence of guilt procured through leads developed by illegal wire-tapping.

In *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, the court condemned the use of evidence, the existence

of which had been discovered by an illegal search and seizure of other corporate records of the defendant.

Citing *Wong Sun v. United States*, 371 U. S. 471, holding that "verbal evidence may be the fruit of official illegality under the Fourth Amendment * * *", this court recently affirmed its earlier rule that " 'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment * * *" (*Berger v. New York*, 388 U. S. 41, 51-52).

The constitutional protection of the Fifth Amendment should also extent to the "verbal evidence" of Peacock and Sweet. It was "the fruit of official illegality" (*Berger v. New York, supra*).

2

The Grand Jury testimony of each defendant was necessarily in the nature of a confession. It was admitted in violation of their federal constitutional rights, without any preliminary hearing.

The Grand Jury testimony of both defendants was received over defense objection that no preliminary hearing had been held as to its admissibility (People's Exhibit 106, Peacock, Exhibits 107, 108, Sweet; R. 1216-17; H. 1223; R. 1474).

The trial court overruled defense objections on this ground, holding that "* * * where both defendants signed waivers of immunity and testified voluntarily before a Grand Jury, the rules calling for a preliminary hearing are not applicable" (R. 1250).

While the defendants were convicted only under the 5th and 6th counts of the indictment, charging perjury, the probative relevancy of their Grand Jury testimony was in no way limited by the trial court, either during the trial or in its charge. The defendants' Grand Jury testimony was received against them on all counts of the indictment, including the burglary and attempted grand larceny counts; and not merely on the perjury counts.

At least with reference to the conspiracy, burglary and attempted grand larceny counts, the defendants' Grand Jury testimony could have had no probative value, except by way of admission or confession.

The Grand Jury testimony was read to the trial jury, over objection. It was voluminous (Peacock, R. 1338; Sweet, R. 1555).

Although the defendants were acquitted of all but the two perjury charges, nevertheless, if their Grand Jury testimony was coerced, and was received without a preliminary hearing as to its admissibility, the defendants did not receive a fair trial, in further violation of their federal constitutional rights (*Jackson v. Denno*, 378 U. S. 368, followed in *Peo. v. Huntley*, 15 N. Y. 2d 72).

In *Garrity v. New Jersey*, the coerced testimony was admitted by the trial court only after a preliminary hearing, outside the presence of the jury, at which the trial court held the testimony to have been voluntary.

The entire indictment against Peacock and Sweet was to a large extent the fruit of their tainted Grand Jury testimony.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Buffalo, N. Y.,
Attorney for Petitioner,
Earl C. Peacock, Jr.

EDWARD K. O'SHEA,
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Buffalo, N. Y.,
Attorney for Petitioner,
Frederick L. Sweet.

April 3, 1968.

APPENDICES

APPENDIX 1

Appellate Division Certificate Denying Leave to Appeal to the New York Court of Appeals

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

vs.

EARL C. PEACOCK, JR., FREDERICK L. SWEET,
Defendants-Appellants.

I, ALGER A. WILLIAMS, Presiding Justice of the Supreme Court, Appellate Division, Fourth Department, do hereby certify that, upon application timely made by the above named appellants for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied from a judgment of the Appellate Division, Fourth Department, unanimously affirming a judgment of conviction of the County Court, Erie County, rendered on January 12th, 1967, convicting defendants of two counts of Perjury in the First Degree.

/s/ ALGER A. WILLIAMS,
Presiding Justice.

Dated: Buffalo, New York, March 18, 1968.

APPENDIX 2

Appellate Division Amended Order of Affirmance, Earl C. Peacock, Jr.

Motion #643/1967

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 25th day of March, 1968.

Present: Hon. Earle C. Bastow, *Justice Presiding.*
" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio,
" John S. Marsh,
Associate Justices.

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

EARL C. PEACOCK, JR.,
Appellant.

A motion having been made on the part of the appellant for an order amending the order of this Court entered January 18, 1968 affirming a judgment of conviction of the Erie County Court,

Now, upon reading and filing the affidavit of Edward K. O'Shea individually and as co-counsel with Charles J. McDonough, sworn to the 19th day of March, 1968, the

notice of said motion together with proof of service upon the attorney for the respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is granted, and the order heretofore entered January 18, 1968 is hereby amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, *viz.:* Defendant contended that he was compelled in a criminal case to be a witness against himself before a Grand Jury of Erie County in violation of his rights under the Fifth Amendment to the United States Constitution; and that his rights guaranteed under the Fourteenth Amendment to the United States Constitution were similarly violated by said alleged compulsion. The Appellate Division, Fourth Department, in affirming the judgment of conviction (29 A. D. 2d 735), necessarily held that there was no denial of any constitutional right of defendant.

Enter.

LESTER A. FANNING.

Entered: March 28, 1968.
Lester A. Fanning,
Clerk.

APPENDIX 3

Appellate Division Amended Order of Affirmance, Frederick L. Sweet

644/1967

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 25th day of March, 1968.

Present: Hon. Earle C. Bastow,

Justice Presiding.

" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio,
" John S. Marsh,

Associate Justices.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

FREDERICK L. SWEET,

Appellant.

A motion having been made on the part of the appellant for an order amending the order of this Court entered January 18, 1968 affirming a judgment of conviction of the Erie County Court,

Now, upon reading and filing the affidavit of Edward K. O'Shea, individually and as co-counsel with Charles J. McDonough, sworn to the 19th day of March, 1968, the notice of said motion together with proof of service upon the attorney for the respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is granted, and the order heretofore entered January 18, 1968 is hereby amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, *viz.:* Defendant contended that he was compelled in a criminal case to be a witness against himself before a Grand Jury of Erie County in violation of his rights under the Fifth Amendment to the United States Constitution; and that his rights guaranteed under the Fourteenth Amendment to the United States Constitution were similarly violated by said alleged compulsion. The Appellate Division, Fourth Department, in affirming the judgment of conviction (29 A. D. 2d 735), necessarily held that there was no denial of any Constitutional right of defendant.

Enter.

LESTER A. FANNING,
Clerk.

Entered: March 28, 1968.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y. } ss.:

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 28th day of March 1968.

LESTER A. FANNING,
Clerk.

(Seal)

APPENDIX 4

Appellate Division Order of Affirmance, Earl C. Peacock, Jr.

643

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 8th day of January, 1968.

Present: Hon. Earle C. Bastow,

Justice Presiding.

" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio,
" John S. Marsh,

Associate Justices.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

EARL C. PEACOCK, JR.,

Appellant.

The above named Earl C. Peacock, Jr., defendant in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Erie County Court, entered in the office of the Clerk of the County of Erie, on the 12th day of January, 1967, and said appeal having been argued by Mr. Charles J. McDonough, of counsel for the appellant, and by Mr.

Arthur G. Baumeister, of counsel for the respondent, and due deliberation having been had thereon

It is hereby ORDERED That the judgment so appealed from be, and the same hereby is unanimously affirmed. See People v. Goldman, 20 N. Y. 2d ____, decided December 28, 1967; People v. Tomasello, 20 N. Y. 2d ____, decided December 28, 1967.

Enter.

LESTER A. FANNING.

Entered: 18th day of January, 1968.
Lester A. Fanning,
Clerk.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y. } ss.:

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action or proceeding.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 18th day of January 1968.

LESTER A. FANNING,
(Seal) *Clerk.*

APPENDIX 5

Appellate Division Order of Affirmance, Frederick L. Sweet

644

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 8th day of January, 1968.

Present: Hon. Earle C. Bastow,

Justice Presiding.

" Harry D. Goldman,
" Frederic T. Henry,
" Frank Del Vecchio,
" John S. Marsh,

Associate Justices.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

FREDERICK L. SWEET,

Appellant.

The above named Frederick L. Sweet, defendant in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Erie County Court, entered in the office of the Clerk of the County of Erie, on the 12th day of January, 1967, and said appeal having been argued by Mr. Edward K. O'Shea, of counsel for the appellant, and by Mr. Arthur G.

Baumeister, of counsel for the respondent, and due deliberation having been had thereon

It is hereby ORDERED That the judgment so appealed from be, and the same hereby is unanimously affirmed. See People v. Goldman, 20 N. Y. 2d ____, decided December 28, 1967; People v. Tomasello, 20 N. Y. 2d ____, decided December 28, 1967.

Enter.

LESTER A. FANNING.

Entered: 18th day of January, 1968.
Lester A. Fanning,
Clerk.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y. } ss.:

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action or proceeding.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 18th day of January 1968.

LESTER A. FANNING,
Clerk.

(Seal)

APPENDIX 6

Appellate Division Memorandum Opinion, Earl C. Peacock, Jr.

643. (Erie Co.)—People of the State of New York, Respondent, v. Earl C. Peacock, Jr., Appellant.—Judgment unanimously affirmed. See People v. Goldman, 20 N. Y. 2d ____, decided December 28, 1967; People v. Tomasello, 20 N. Y. 2d ___, decided December 28, 1967. (Appeal from Judgment of Erie County Court, Burke, J., convicting defendant of Perjury, 1st degree). Present: Bastow, J. P., Goldman, Henry, DelVecchio, and Marsh, JJ.

APPENDIX 7

Appellate Division Memorandum Opinion, Frederick L. Sweet

644. (Erie Co.)—People of the State of New York, Respondent, v. Frederick L. Sweet, Appellant.—Judgment unanimously affirmed. See People v. Goldman, 20 N. Y. 2d ___, decided December 28, 1967; People v. Tomasello, 20 N. Y. 2d ___, decided December 28, 1967. (Appeal from Judgment of Erie County Court, Burke, J., convicting defendant of Perjury, 1st degree.) Present: Bastow, J. P., Goldman, Henry, DelVecchio, and Marsh, JJ.

APPENDIX 8

Indictment, People v. Peacock & Sweet

COUNTY COURT—ERIE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
against
EARL C. PEACOCK, JR., FREDERICK L. SWEET.

Indictment No. 31,548-A.

INDICTMENT.

The Grand Jury of the County of Erie, by this indictment, accuse Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

FIRST COUNT: Conspiracy, contrary to the Penal Law, Section 580, committed as follows:

That between on or about the 26th day of May, 1964 and on or about the 22nd day of October, 1964, at the City of Buffalo, in this County, the defendants herein did unlawfully, wilfully, knowingly, maliciously and corruptly conspire, combine and confederate, and agree together and with each other to circumvent and violate the provisions of Sections 2, 260, 400, 404, 580, 1290, 1294, 1620, 1620-a, 1622 and 1857 of the Penal Law of the State of New York by means which were in themselves criminal and which, when executed, amounted to violations of the aforesaid sections of the Penal Law.

OVERT ACTS.

1. That pursuant to said conspiracy, and to achieve the purpose thereof, the said Earl C. Peacock, Jr. had a certain transistor radio equipped with a converter tuned and adjusted to receive broadcasts on the short radio wave allotted to the Buffalo Police Department.

2. That pursuant to said conspiracy, and to achieve the purpose thereof, the defendants herein were in the lot of the Metal & Alloy Company immediately adjacent to the business establishment commonly referred to as the Huber-Lanctot Lumber Company at approximately 6:00 P. M. on June 3, 1964.

3. That pursuant to said conspiracy, and to achieve the purpose thereof, the defendants herein, both of whom were assigned to car 17-N of the 17th Precinct of the Buffalo Police Department, reported out of service at 9:41 P. M. on June 3, 1964 and missed a run at 10:08 P. M. the same night.

4. That pursuant to said conspiracy, and to achieve the purpose thereof, the defendants herein at some time prior to 10:08 P. M. on the 3rd day of June, 1964, parked car 17-N of the 17th Precinct of the Buffalo Police Department in Sattler's parking lot located on the south side of Hertel Avenue directly across the street from the office, display room and lumber yard commonly referred to as the Huber-Lanctot Lumber Company.

5. That pursuant to said conspiracy, and to achieve the purposes thereof, the defendants herein testified falsely before the Additional August, 1964 Grand Jury of the County Court of Erie County, as more fully set forth in Counts Four, Five, Six, Seven and Eight of this indictment.

SECOND COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

Burglary in the Third Degree, contrary to the Penal Law, Sections 2, 400, 404, in that they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, on or about the 3rd day of June, 1964, at the City of Buffalo, in this County, each being then and there aided and abetted by the other, feloniously broke into and entered the office, display room and building of Frank C. Huber, doing business under the assumed name and style of Huber-Lanctot Frank C. Huber, Successor, and the Frank C. Huber Co., Inc., a body corporate, with intent to commit a crime therein, to wit: Larceny.

THIRD COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

Attempted Grand Larceny in the First Degree, contrary to the Penal Law, Sections 2, 260, 1290, 1294, in that they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, on or about the 3rd day of June, 1964, at the City of Buffalo, in this County, each being then and there aided and abetted by the other, with intent to deprive and defraud the true owners of their property and of the use and benefit thereof and to appropriate the same to their own use, did feloniously attempt to steal upwards of $500.00, in money, from Frank C. Huber, doing business under the assumed name and style of Huber-Lanctot Frank C. Huber, Successor and the Frank C. Huber Co., Inc., a body corporate, such acts tending to but failing to effect

the commission of the crime of Grand Larceny in the First Degree.

FOURTH COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr., of the following crime:

Perjury in the First Degree, contrary to the Penal Law, Sections 1620, 1620-a, 1622, in that he, the said Earl C. Peacock, Jr. between on or about the 25th day of September, 1964, and on or about the 28th day of September, 1964, at the City of Buffalo, in this County, being then and there a witness before the Additional August, 1964 Grand Jury of the County Court of Erie County, the said Grand Jury being then and there engaged in a certain John Doe inquiry and investigation into burglary, larceny, conspiracy and violations of Sections 1839, 1841, 1857 and 1866 of the Penal Law, and other matters of every nature whatsoever appertaining thereto, and the said Earl C. Peacock, Jr. having been then and there and in that matter sworn in due form of law by Hubert Elskamp, the Foreman of the said Grand Jury, to speak the truth and nothing but the truth in the testimony which he should give in said inquiry and investigation, the said Hubert Elskamp having then and there authority to administer said oath, as Foreman of the said Grand Jury, and the said Grand Jury having then and there jurisdiction to conduct said inquiry and investigation, and it being then and there a question material to the result of the said inquiry and investigation whether or not the said Earl C. Peacock, Jr. and Frederick L. Sweet, both of whom were at the time admittedly assigned to and occupants of car 17-N of the 17th Precinct of the Buffalo Police Department, responded to a call from the Buffalo Police Radio Dispatcher at 10:08 P. M. on June 3, 1964 to cars 17-N or 17-S and a call from the Buffalo

Police Radio Dispatcher in the same time period to car 13-N to cover for 17, to this material question the said Earl C. Peacock did wilfully, corruptly, knowingly and feloniously testify falsely that he saw and heard the said Frederick L. Sweet attempt to respond to the call to car 13-N, whereas, in truth and in fact, said testimony was false and untrue, as he, the said Earl C. Peacock, Jr. then and there well knew.

FIFTH COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

Perjury in the First Degree, contrary to the Penal Law, Sections 1620, 1620-a, 1622, in that they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, between on or about the 15th day of September, 1964 and on or about the 22nd day of October, 1964, at the City of Buffalo, in this County, being then and there witnesses before the Additional August, 1964 Grand Jury of the County Court of Erie County, the said Grand Jury being then and there engaged in a certain John Doe inquiry and investigation into burglary, larceny, conspiracy and violations of Sections 1839, 1841, 1857 and 1866 of the Penal Law and other matters of every nature whatsoever appertaining thereto, and the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, having been then and there and in that matter sworn in due form of law by Hubert Elskamp, the Foreman of the said Grand Jury, to speak the truth and nothing but the truth in the testimony which they should give in said inquiry and investigation, the said Hubert Elskamp having then and there authority to administer said oath, as Foreman of the said Grand Jury, and the said Grand Jury having then and there juris-

diction to conduct said inquiry and investigation, and it being then and there a question material to the result of the said inquiry and investigation whether or not the said Earl C. Peacock, Jr. and Frederick L. Sweet proceeded west on Hertel Avenue in car 17-N of the 17th Precinct of the Buffalo Police Department subsequent to a call from the Buffalo Police Radio Dispatcher at 10:08 P. M. on the night of June 3, 1964, and turned left into a parking lot commonly known as Sattler's parking lot, to this material question the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, did wilfully, corruptly, knowingly and feloniously testify falsely that they did proceed west on Hertel Avenue and did turn left off Hertel Avenue into the said Sattler's parking lot subsequent to the aforementioned call; whereas, in truth and in fact, said testimony was false and untrue, as they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, then and there well knew.

SIXTH COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

Perjury in the First Degree, contrary to the Penal Law, Sections 1620, 1620-a, 1622, in that they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, between on or about the 15th day of September, 1964 and on or about the 22nd day of October, 1964, at the City of Buffalo, in this County, being then and there witnesses before the Additional August, 1964 Grand Jury of the County Court of Erie County, the said Grand Jury being then and there engaged in a certain John Doe inquiry and investigation into burglary, larceny, conspiracy and violations of Sections 1839, 1941, 1857 and 1866 of the Penal

Law and other matters of every nature whatsoever appertaining thereto, and the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, having been then and there and in that matter sworn in due form of law by Hubert Elskamp, the Foreman of the said Grand Jury, to speak the truth and nothing but the truth in the testimony which they should give in said inquiry and investigation, the said Hubert Elskamp having then and there authority to administer said oath as Foreman of the said Grand Jury, and the said Grand Jury having then and there jurisdiction to conduct said inquiry and investigation, and it being then and there a question material to the result of the said inquiry and investigation whether or not the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, on or about the 3rd day of June, 1964, pursued an automobile in Sattler's parking lot, to this material question the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, did wilfully, corruptly, knowingly and feloniously testify falsely that they pursued a large, dark car in Sattler's parking lot; whereas, in truth and in fact, said testimony was false and untrue, as they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, then and there well knew.

SEVENTH COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

Perjury in the First Degree, contrary to the Penal Law, Sections 1620, 1620-a, 1622, in that they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, between on or about the 15th day of September, 1964 and on or about the 22nd day of October, 1964, at the City of Buffalo, in this County, being then and there witnesses

before the Additional August, 1964 Grand Jury of the County Court of Erie County, the said Grand Jury being then and there engaged in a certain John Doe inquiry and investigation into burglary, larceny, conspiracy and violations of Sections 1839, 1941, 1957 and 1866 of the Penal Law, and other matters of every nature whatsoever appertaining thereto, and the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, having been then and there and in that matter sworn in due form of law by Hubert Elskamp, the Foreman of the said Grand Jury, to speak the truth and nothing but the truth in the testimony which they should give in said inquiry and investigation, the said Hubert Elskamp having then and there authority to administer said oath as Foreman of the said Grand Jury, and the said Grand Jury having then and there jurisdiction to conduct said inquiry and investigation, and it being then and there a question material to the result of the said inquiry and investigation whether or not the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, participated in the burglary of the business establishment commonly referred to as the Huber-Lanctot Lumber Company, on or about the 3rd day of June, 1964, to this material question the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, did wilfully, corruptly, knowingly and feloniously deny that they participated in said burglary; whereas, in truth and in fact, said denial was false and untrue, as they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, then and there well knew.

EIGHTH COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Frederick L. Sweet of the following crime:

Perjury in the First Degree, contrary to the Penal Law, Sections 1620, 1620-a, 1622, in that he, the said Frederick

L. Sweet, between on or about the 15th day of September, 1964, and on or about the 22nd day of October, 1964, at the City of Buffalo, in this County, being then and there a witness before the Additional August, 1964 Grand Jury of the County Court of Erie County, the said Grand Jury being then and there engaged in a certain John Doe inquiry and investigation into burglary, larceny, conspiracy and violations of Sections 1839, 1841, 1857 and 1866 of the Penal Law, and other matters of every nature whatsoever appertaining thereto, and the said Frederick L. Sweet having been then and there and in that matter sworn in due form of law by Hubert Elskamp, the Foreman of the said Grand Jury, to speak the truth and nothing but the truth in the testimony which he should give in said inquiry and investigation, the said Hubert Elskamp having then and there authority to administer said oath as Foreman of the said Grand Jury, and the said Grand Jury having then and there jurisdiction to conduct said inquiry and investigation, and it being then and there a question material to the said inquiry and investigation whether or not the said Frederick L. Sweet, subsequent to the arrival of other police officers at the scene of the burglary on or about the 3rd day of June, 1964, at the business establishment commonly referred to as the Huber-Lanctot Lumber Co., climbed up to the roof of a storage shed which was part of the said premises, and, in moving from one roof level to another, his leg went through the roof, up to his hip, to this material question the said Frederick L. Sweet did wilfully, corruptly, knowingly and feloniously testify falsely that he did climb to the said roof in the said time period and that his leg did go through the roof in the aforesaid manner; whereas, in truth and in fact, said testimony was false and untrue, as he, the said Frederick L. Sweet then and there well knew.

NINTH COUNT: And the Grand Jury of the County of Erie, aforesaid, by this indictment, do further accuse the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, of the following crime:

Violation of Section 1857 of the Penal Law, in that they, the said Earl C. Peacock, Jr. and Frederick L. Sweet, and each of them, on or about the 3rd day of June, 1964, at the City of Buffalo, in this County, being then and there public officers, to wit: duly appointed and acting patrolmen in the City of Buffalo Police Department, upon whom the duty was enjoined by law to apprehend a person or persons engaged in the commission of burglary, wilfully and unlawfully omitted to perform their official duty as such police officers.

The acts alleged in the aforementioned counts of this indictment are connected together with and arise out of the same transaction.

MICHAEL F. DILLON,
District Attorney of the County of Erie.

APPENDIX 9

New York Court of Appeals Opinion,
People v. Tomasello

21 N. Y. 2d 143

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v

ALFRED TOMASELLO,
Respondent.

Court of Appeals of New York.
Dec. 28, 1967.

[145] FULD, Chief Judge.

The present appeal raises a question of considerable importance in the field of criminal law: Is a pros- [146] pective defendant or a target of an investigation who is called before a grand jury immune from indictment and prosecution for perjury if his testimony is found to be willfully false?

In 1962, the Attorney-General, upon the request of the Superintendent of Public Works, undertook a State-wide investigation into crimes and irregularities committed on public works projects let by the Department of Public Works. Some time later, upon application of the Attorney-General, a grand jury (denominated the Additional October 1963 Grand Jury) was impaneled in Suffolk County to ascertain whether any person or corporation employed

on such public works projects in that county had stolen or misappropriated property belonging to the State. Zara Contracting Company was engaged in constructing a segment of the Long Island Expressway in Suffolk County in the early 1960's, and the grand jury turned its attention to reports that that concern and its officers, Graziano and Samuel Zara, had removed from the construction site topsoil and asphalt—paid for by the State and intended for the Expressway—and used such materials on private jobs of their own.

After hearing evidence that trucks of the Zara Company had delivered some building material to sites on which Alfred Tomasello was erecting private homes for himself and his brother in Brookville, the grand jury subpoenaed him to appear and give testimony. Interrogated at some length concerning his dealings with the Zaras, Tomasello denied that he had even received topsoil or other building material from them.

Apparently based on evidence thereafter given by other witnesses, the grand jury, in January, 1964, indicted Tomasello for perjury in the first degree, the indictment charging that his testimony that "he had never received * * * any topsoil transported in [Zara] trucks * * * was wilfully and knowingly false".[1] In March, two months after the filing of this indictment, the grand jury indicted the Zaras for crimes [147] of grand larceny and conspiracy stemming from the theft of topsoil from the State, and Tomasello, though not indicted, was named as having "aided and abetted" in the commission of those crimes and as having "conspired" to commit them.

[1] The indictment contains the recital that "It became material to said investigation to inquire and ascertain whether the defendant had received topsoil, the same being the property of the State of New York, which had been removed from the Long Island Expressway, and whether said topsoil had been transported and delivered in [Zara trucks] * * * to the defendant at said premises in Brookville, New York."

The defendant moved to dismiss the perjury indictment against him as "invalid" on several grounds—first, "in that [his] constitutional rights were invaded in that he was compelled to testify before the Grand Jury against himself and was a target of its investigation"; second, in that unauthorized persons, to wit, assistant attorneys general, were present before the grand jury while the charge was under consideration; and, third, in that the indictment was based upon insufficient evidence.

Justice Munder who heard the application at a Criminal Term of the Supreme Court granted the motion on the first ground asserted and dismissed the indictment. More specifically, he decided that Tomasello was "a possible defendant and a prime target of the investigation"; that calling him before the grand jury violated his constitutional privilege against self incrimination; and that such violation prevented the People from using such testimony "for any purpose", including prosecution for perjury. (48 Misc. 2d 156, 158-159, 264 N. Y. S. 2d 686, 689.) The Appellate Division unanimously affirmed the dismissal of the indictment, although two of the justices concurred solely on the ground that they felt "bound by the statements of the Court of Appeals in effect adopting the reasoning of Mr. Justice McLaughlin in People v. Gillette, 126 App. Div. 665, 111 N. Y. S. 133" (27 A. D. 2d 562, 277 N. Y. S. 2d 607).

There should be a reversal and reinstatement of the indictment. Although a majority of the court agrees with the determination below that Tomasello was a "possible defendant", we have, nevertheless, concluded that he may be prosecuted for perjury if his testimony was willfully and knowingly false. It is frequently difficult, if not impossible, to ascertain whether one called before a grand

jury is, on the one hand, such a defendant or "target" of the investigation or, on the other, a mere "witness" (*Cf.* United States v. Parker, 7 Cir., 244 F. 2d 943, 946 *et seq.*, cert. den. 355 U. S. 836, 78 S. Ct. 61, 2 L. Ed. 2d 48). For this reason, as well as others later adverted to, we believe that elimination of any distinction, so far as perjury prosecutions are concerned, better comports with reason and the proper administration of the criminal law.

[148] The distinction was long ago drawn by Justice McLaughlin in People v. Gillette, 126 App. Div. 665, 111 N. Y. S. 133. Writing in that case, he expressed the view that, where a grand jury investigation was directed against a particular individual, it was "a violation of his constitutional right to require him to attend before the grand jury and take an oath" and, since "the oath could not be legally administered to him", an indictment obtained against him "would be invalid, and he could not be convicted of perjury for the testimony which he gave" (p. 668, p. 135 of 111 N. Y. S.).[2] In recent years, our court has approved that rationale (see, *e.g.*, People v. Yonkers Contr. Co., 17 N. Y. 2d 322, 335, 270 N. Y. S. 2d 745, 753, 217 N. E. 2d 829, 834; People v. Laino, 10 N. Y. 2d 161, 172, 218 N. Y. S. 2d 647, 656, 176 N. E. 2d 571, 578; People v. Steuding, 6 N. Y. 2d 214, 217, 189 N. Y. S. 2d 166, 168, 160 N. E. 2d 468, 470; People v. De Feo, 308 N. Y. 595, 603, 127 N. E. 2d 592, 596), going so far as to state in the De Feo case (308 N. Y. 595, 127 N. E. 2d 592, *supra*) that, "[u]nder the rule enunciated in the Gillette case (*supra*) and long followed, it was deemed a violation of constitutional rights to examine a witness concerning his own acts and prosecution for perjury or contempt arising

[2] This view did not represent the holding of the court. Three of the judges agreed with Justice McLaughlin for dismissal of the indictment on other grounds which he had advanced (126 App. Div. at p. 674, 111 N. Y. S. at p. 139).

from such testimony was prohibited" (p. 603, p. 596 of 127 N. E. 2d). However, that language must be read in the light of the court's conclusion that the "immunity" there conferred on the defendant was not as "broad" as his constitutional privilege against self incrimination (p. 604, p. 596 of 127 N. E. 2d). It is significant that the court relied not on any theory that an oath could not be legally administered to the defendant, not on any principle of an oath void *ab initio*, but on a realistic assessment of the position in which De Feo had been placed. What concerned the court was that the People would be able to use the testimony given by a defendant "in prosecuting [him for] some substantive crime" (p. 604, p. 596 of 127 N. E. 2d). Prompted by such considerations, the court refused to uphold the defendant's conviction for criminal contempt of court.

The danger envisaged in *De Feo* was obviated by our decision in People v. Steuding (6 N. Y. 2d 214, 189 N. Y. S. 2d 166, 160 N. E. 2d 468, *supra*). We there declared that, if a prospective defendant or a target of an investigation is called and examined before a grand jury, "his constitutionally-conferred privilege against self incrimination is deemed violated," even though he does not assert his privilege and [149] as a consequence of such violation, added the court, "the defendant is protected not only from indictment based on any incriminating testimony which he may have given, but also from use of such evidence" (p. 217, p. 167 of 189 N. Y. S. 2d, p. 470 of 160 N. E. 2d). Since, then, the prospective defendant is automatically cloaked with an "immunity" as broad as the constitutional privilege, fully protecting him from prosecution for substantive crimes on the strength of his testimony, such immunity, to cull from a typical decision, should "not endow [him] with a

license to commit perjury." (Glickstein v. United States, 222 U. S. 139, 142, 32 S. Ct. 71, 73, 56 L. Ed. 128.)

It is true that the cases declaring and holding that he may be prosecuted for perjury involve, with rare exception (see United States v. Orta, 5 Cir., 253 F. 2d 312, 314, cert. den. 357 U. S. 905, 78 S. Ct. 1149, 2 L. Ed. 2d 1156), not a situation such as the present, in which the defendant's constitutional privilege was voilated—resulting in an automatic protection against use of his testimony—but one in which the prospective defendant testified falsely after being granted statutory immunity.[3] However, the reasoning which underlies the decisions cited is equally applicable to the case before us. It would, certainly, be highly unrealistic to afford an individual an automatic protection from prosecution for substantive crimes based on his testimony and at the same time immunize him from a charge of perjury if, in giving that testimony, he knowingly and willfully lies. As the Supreme Court wrote in the *Glickstein* case (222 U. S. 139, 142, 32 S. Ct. 71, 73, 56 L. Ed. 128, *supra*), "it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. * * * Of course, these propositions being true, it is also true that the immunity [150] afforded by the constitutional

[3] See, *e.g.*, People v. Cahill, 126 App. Div. 391, 395, 110 N. Y. S. 728, 731, affd. 193 N. Y. 232, 86 N. E. 39; People v. Florentine, 276 App. Div. 730, 732, 97 N. Y. S. 2d 553, 555; Glickstein v. United States, 222 U. S. 139, 141, 32 S. Ct. 71, 56 L. Ed. 128, *supra*; United States v. Winter, 2 Cir., 348 F. 2d 204, 209, cert. den. 382 U. S. 955, 86 S. Ct. 429, 15 L. Ed. 2d 360; Warren v. State, 153 Ark. 497, 502, 241 S. W. 15; State v. Turley, 153 Ind. 345, 347, 55 N. E. 30; State v. Nolan, 231 Minn. 522, 529, 44 N. W. 2d 66; State v. Lehman, 175 Mo. 619, 628-629, 75 S. W. 139; State v. Cox, 87 Ohio St. 313, 347, 101 N. E. 135; State v. DeCola, 33 N. J. 335, 354, 164 A. 2d 729; State *ex rel.* Hemmings v. Coleman, 137 Fla. 80, 95-96, 187 So. 793; In People v. Cahill, 126 App. Div. 391, 110 N. Y. S. 728, affd. 193 N. Y. 232, 86 N. E. 39, *supra*, and the other New York cases, there was a statute, separate and apart from the one granting immunity, which provided that the witness was subject to a prosecution for perjury if he gave false testimony.

guarantee relates to the past, and does not endow the person who testifies with a license to commit perjury." And, in People v. Cahill, 126 App. Div. 391, 395, 110 N. Y. S. 728, 731, affd. N. Y. 232, 86 N. E. 39, *supra*, the Appellate Division noted that it would be a strange notion that "because the defendant was under legal compulsion to testify * * * he was free to testify falsely without being amenable to the penalties of perjury * * * it must be manifest that the immunity is only given for past crimes, not for future ones."

In other words, the protection against prosecution, whether under a statute or in consequence of a violation of the constitutional privilege, extends only to prosecution for past crimes and not to perjury committed in the very process of making the disclosure assertedly compelled. As Wigmore put it in his work on Evidence ([McNaughton rev. ed., 1961], Vol. VIII, § 2282 (p. 512)):

> "If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself—for the perjured utterance is not 'evidence' or 'testimony' to a crime but is the very act of crime itself; the compulsion is not to testify falsely but to testify truly; and the privilege by hypothesis would have been violated only if the witness had truly given self-incriminating evidence, but if he falsely exonerates himself, he has confessed no fact 'against himself,' hence his privilege has not been infringed by the actual answer even though it might have been by some other answer."

Since, then, Tomasello, as a prospective defendant or target, acquired a protection from prosecution for substantive crimes based on his "compelled" testimony, he

may not, and should not, be permitted to escape prosecution for perjury committed in connection with the very testimony that cloaked him with such protection. Courts "do not preserve justice", a Federal Court of Appeals aptly observed in a somewhat related context (United States v. Remington, 2 Cir., 208 F. 2d 567, 570, cert. den. 347 U. S. 913, 74 S. Ct. 476, 98 L. Ed. 1069), "by allowing further criminal activity to take place."

In short, the courts below should not have granted Tomasello's motion to dismiss the indictment on the ground that he was [151] immune from prosecution for perjury because he was a target or a possible defendant. However, as noted above, two other grounds were urged for dismissal of the indictment, and to them we briefly turn.

As to the first of these grounds—the allegedly unauthorized presence of assistant attorneys general before the grand jury—the Appellate Division very recently held (People v. Yonkers Contr. Co., 24 A. D. 2d 641, 262 N. Y. S. 2d 298) that the Attorney-General and his assistants are privileged and authorized to appear before the grand jury and obtain an indictment for the offenses there involved, *viz.* bribery and the like, and we expressly affirmed that portion of the Appellate Division's holding (17 N. Y. 2d 322, 338, 270 N. Y. S. 2d 745, 755, 217 N. E. 2d 829, 836, *supra*). In the present context, the argument that perjury is to be distinguished from other offenses and that our decision in *Yonkers Contracting* does not authorize the Attorney-General to obtain an indictment for perjury is specious.

As to the remaining ground asserted by the defendant—that the indictment was based on insufficient evidence—it seems clear that the courts below did not address themselves to that subject, and in this court neither defense

counsel nor the Attorney-General discussed it in brief or on oral argument. The defendant in his motion papers below requested that, if his challenge to the indictment on the first ground advanced by him were defeated, he be granted an opportunity to renew his application for dismissal on the ground that the evidence before the grand jury was insufficient to support the indictment. Under the circumstances, the defendant should be accorded that opportunity.

The order appealed from should be reversed and the indictment re-instated, without prejudice, however, to a motion by the defendant to inspect the grand jury minutes in their entirety and to dismiss the indictment on the ground that there was insufficient evidence to support the charge of perjury.

Van Voorhis, Burke, Scileppi, Bergan, Keating and Breitel, JJ., concur.

Order reversed, etc.

APPENDIX 10

New York Court of Appeals Opinion,
People v. Goldman
21 N. Y. 2d 152

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v

LEWIS P. GOLDMAN,
Appellant.

Court of Appeals of New York.
Dec. 28, 1967.

[P. 154] BREITEL, Judge.

Defendant Lewis Goldman, a former New York City Police Officer, appeals from a judgment of the Appellate Division, First Department, which unanimously affirmed, without opinion, his conviction on two counts of perjury in the first degree (former Penal Law, §§ 1620, 1620-a). In 1964 defendant had signed a limited waiver of immunity and testified before the Grand Jury of New York County which was then investigating bribery of public officials in connection with violations of the gambling laws. During his testimony, defendant denied that he had ever met one "Grumpy" Johnson, a gambler, or that he had ever received anything from Johnson in August, 1960. An indictment for perjury, based on these denials, was returned against defendant on July 19, 1965. After a jury trial in Supreme Court, New York County, defendant was con-

victed of perjury on March 14, 1966 and sentenced to a term of one year and six months to three years.

Relying on Garrity v. State of New Jersey, 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562, defendant's primary contention is that the waiver of immunity signed by him prior to his testimony was wholly "void" because it was extracted on pain of losing his job (New York City Charter, § 1123). Consequently, as he was a prospective defendant of the Grand Jury investigation, defendant claims that he could not be prosecuted for his allegedly perjurious testimony before that body "in the absence of a * * * validly executed waiver of immunity." Alternatively, defendant argues that he was "deprived of due process" in that the events which formed the basis of his testimony before the Grand [P. 155] Jury and which led to his indictment for perjury occurred in 1960, more than four years before he was called as a witness. Finally, defendant argues that there was insufficient evidence to support his conviction because he never made a "clear and unequivocal" denial before the Grand Jury that he had known or received anything from the gambler, Johnson.

On September 29, 1964 defendant appeared before the Grand Jury and was informed of the purpose of its investigation. He was advised that he had a right to refrain from answering questions which he believed might incriminate him but that if he wished to retain his employment as a police officer, he was required to sign a limited waiver of immunity. Defendant was also informed that if he signed the waiver, "whatever you say may be used in evidence against you should you become a defendant." Defendant stated that he understood and, thereafter signed a waiver.

Apart from some preliminary questions concerning his finances, the inquiry of defendant was confined to his activities on August 3, 1960 and, specifically, whether he had met the gambler, Johnson, on that date and received anything from him. Defendant was shown a photograph taken on that date by a hidden police motion picture camera which depicted Johnson handing something to another man. While he conceded that the other man in the picture "looks like me," defendant gave the following answers when he was questioned about Johnson:

"Question: Do you know a policy gambler by the name of Johnson?

Answer: No, sir.

Question: Did you ever meet him?

Answer: No, sir.

Question: Did you ever talk to him?

Answer: No, sir.

Question: I direct your attention again to Grand Jury Exhibit 220 and ask you whether or not you Patrolman Goldman, in August of 1960, ever received anything from Mr. Johnson?

Answer: I don't even know Mr. Johnson, Mr. Andreoli.

Question: Will you look at 220 [the picture] again?

Answer: Yes, sir.

[P. 156] Question: That shows a picture of a man, I will tell you his name is Mr. Johnson, handing something to a man standing on the stairway which you say looks like you?

Answer: Yes, sir.

Question: Did you, Patrolman Goldman, ever receive anything from the man shown in that picture?

Answer: No, sir."

Upon further questioning, defendant stated several times that he did not recall being at the place where the picture was taken nor could he remember the incident depicted. When asked again, however, whether he had ever met Johnson, defendant said, without qualification, "No, sir."

At trial, after this testimony had been introduced, a Detective Robert Miles testified that, while in hiding, he had taken the photograph in question (a "still" excerpted from a motion picture film). Other pictures were introduced of the same incident and Detective Miles identified the two men in all the pictures as defendant and Johnson, a "Known [policy] Gambler." Miles also testified that on two separate occasions during this incident, Johnson had handed money in bill form to defendant. The second payment was made after Johnson had received money from another gambler, William Larkins, and passed it on to defendant.

Another detective, Gerald Edwards, who had observed the meeting between defendant and Johnson, corroborated Miles' testimony and the identifications of the two men in the pictures. William Larkins also testified that he recognized one of the men in the photographs as defendant, who was known to Larkins only as "Louie * * * the captain's man."

Defendant testified in his own behalf and stated that he knew neither Johnson nor Larkins and had never received any money from them. While he admitted that one of the men in the pictures looked like him, defendant denied that it was he or that he had been there. On summation, counsel for defendant stressed that it was unfair for the District Attorney to delay defendant's appearance before the Grand Jury until 1964, four years after his alleged meeting with Johnson.

Turning first to the question of waiver, defendant urges that, as in Garrity v. State of New Jersey, 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562, *supra*, the waiver he signed before his Grand Jury testimony was the product [P. 157] of coercion. In the *Garrity* case, decided almost a year after the trial in this case, the Supreme Court held that the failure of the police officers to raise their privilege against self incrimination was motivated, not by free choice, but by the threat of removal from public office. Consequently, the testimony obtained under this "duress" could not be used against them "in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws" (*supra*, p. 495, 87 S. Ct. p. 617). Defendant, assuming on the authority of the *Garrity* case that his waiver was, therefore, "invalid," concludes that, as he was a "potential defendant" before the Grand Jury, the oath "could not be legally administered to him" and he may not now be prosecuted for perjury, even if People v. Gillette, 126 App. Div. 665, 111 N. Y. S. 2d 133, and subsequent decisions of this court which have followed the *Gillette* rule were applicable. (But see People v. Tomasello, 21 N. Y. 2d 143, 287 N. Y. S. 2d 1, 234 N. E. 2d 190, decided therewith.)

As defendant concedes, the *Gillette* rule, assuming that it were still a viable rule, does not obtain when the witness, albeit a prospective defendant or one of the subjects of the inquiry, waives his right against self-incrimination (see People v. Yonkers Contr. Co., 17 N. Y. 2d 322, 334-335, 270 N. Y. S. 2d 745, 217 N. E. 2d 829; People v. Macner, 171 Misc. 720, 722-723, 13 N. Y. S. 2d 451). Nor has the rule protected one who had been granted immunity from prosecution for any substantive crimes from penalties for perjurious or contumacious testimony (People v. Reiss,

255 App. Div. 509, 511-516, 8 N. Y. S. 2d 209, 211-215, affd. 280 N. Y. 539, 20 N. E. 2d 8; see People v. Gittleson, 18 N. Y. 2d 427, 276 N. Y. S. 2d 596, 223 N. E. 2d 14). The basis for both of these exceptions is that, unlike the situation in the *Gillette* case, defendants who either waive or are granted immunity for substantive crimes may then be "legally" sworn (People v. Reiss, 255 App. Div. 509, 512, 8 N. Y. S. 2d 209, *supra*).

With this in mind, it is appropriate to consider the nature and effect of the waiver signed by defendant, particularly in the light of this court's recent decision in Matter of Gardner v. Broderick, 20 N. Y. 2d 227, 282 N. Y. S. 2d 487, 229 N. E. 2d 184. In the *Gardner* case, the petitioner had been dismissed from the New York City Police Department for refusing to waive his privilege against self incrimination when subpoenaed before the Grand Jury. Relying upon the *Garrity* case, petitioner contended that his discharge was "unconstitutional." The court, while noting that any testimony taken from petitioner under this waiver would [P. 158] be "inadmissible in a criminal prosecution," held, nevertheless, that petitioner's refusal to testify "bore upon his fitness to remain in office" and constituted " 'employee insubordination' " for which he might be dismissed (*supra*, pp. 230-231, 282 N. Y. S. 2d p. 490, 229 N. E. 2d p. 186).

For present purposes, the importance of the *Gardner* case is its holding that a public officer may be validly compelled to testify before a Grand Jury even though his testimony would be the product of "duress"—namely, the threat of removal from public office. True, any waiver exerted by means of this coercive force would be ineffective to prohibit him from raising his right against self incriminatory testimony bearing on a substantive crime, but it by no means

follows that he cannot be legally sworn. Quite the contrary, the *Gardner* case indicates that the oath may be validly administered to a public officer and testimony may be required of him.

And, if such an officer may be compelled to testify, there must, of course, be sanctions for perjurious or contumacious testimony. Otherwise, the result of the *Gardner* case would be largely meaningless: the officer must testify, if he is to keep his position, but he can, with impunity, lie, or even refuse to answer questions.

The most appropriate analogy is to the prospective defendant who is called before the Grand Jury and granted immunity from prosecution for substantive crimes. As noted above, such a witness was not protected by the *Gillette* rule, even before its restatement by this court in People v. Tomasello, 21 N. Y. 2d 143, 287 N. Y. S. 2d 1, 234 N. E. 2d 190, *supra*, in that he may be validly sworn and subsequently prosecuted for perjurious or contumacious answers. The rationale for such a result was explained in Glickstein v. United States, 222 U. S. 139, 32 S. Ct. 71, 56 L. Ed. 128. There, a witness who had been granted immunity under the Bankruptcy Act from prosecution for substantive crimes gave perjurious testimony. In upholding his conviction for perjury, the Supreme Court held: "the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the [defendant's] contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.

"The argument that because the section does not contain [P. 159] an expression of the reservation of a right

to prosecute for perjury in harmony with the reservations in Rev. Stat., 860, and the act of 1893, therefore it is to be presumed and it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect" (*supra*, p. 143, 32 S. Ct. p. 73).

It is interesting to note that in a recent California case involving facts substantially similar to those involved here, the court, relying on the *Glickstein* case, upheld the defendant's conviction for perjury (People v. Genser, Cal. App., 58 Cal. Rptr. 290 [Dist. Ct. of App., 1967]). Even though it does not appear that the California courts have held that a public officer may be dismissed for refusing to waive his privilege against self incrimination when questioned about his official duties, the court in the *Genser* case distinguished the *Garrity* case and held that "one compelled to make sworn statements under compulsion such as illustrated by the facts at bench" does not have "a license to make untruthful statements" (Cal. App., 58 Cal. Rptr. 291, *supra*).

The import of Matter of Gardner v. Broderick (*supra*), like the statute involved in the *Glickstein* case, is that testimony should be given by a public officer and "its manifest purpose is to secure truthful testimony". Even though the testimony may not be used against him in a prosecution for any substantive crime, he is not immune from penalties for crimes inherent in the giving of the testimony itself.

Defendant's additional contentions are of no merit. He contends that when his testimony before the Grand Jury is read as a whole, particularly in the light of his oft-re-

iterated failure of recollection on many details, it is impossible to isolate an outright denial that he ever met Johnson or received something from him. The contention is refuted by the record. While defendant repeatedly professed that he was unable to remember details, such as where he was on the particular day involved, he categorically denied that he knew Johnson, had ever met him, or received anything from him. The falsity of these denials was proved by the testimony of the People's witnesses.

[P. 160] Finally, defendant argues that the District Attorney unfairly delayed his appearance before the Grand Jury until more than four years had elapsed from the time of his meeting with Johnson. The contention is not answered by the fact that the indictment for perjury was brought about nine months after defendant's testimony before the Grand Jury (and, therefore, well within the five-year limitation of section 142 of the Code of Criminal Procedure). But, at most, the delay was a factor to be considered by the jury in determining whether defendant really could not remember meeting Johnson. Counsel for defendant recognized this by stressing the point in his summation, but the jury, in view of his outright denials on this score, must have found that the passage of time had not clouded defendant's memory—at least with respect to his dealings with Johnson.

Accordingly, the judgment of conviction should be affirmed.

Fuld, C. J., and Van Voorhis, Burke, Scileppi, Bergan and Keating, JJ., concur.

Judgment affirmed.